Franklin County Ohio Court of Appeals Clerk of Courts- 2023 Nov 21 5:31 PM-23AP000641

IN THE COURT OF COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

SHERRI J. TENPENNY, D.O.	:	CASE NUMBER:
Appellant,	:	23 AP-10-641
vs.	:	
STATE MEDICAL BOARD OF OHIO	:	
	:	
Appellee.	:	

Notice of Voluntary Dismissal of Appeal from the Franklin County Court of Common Pleas Case No. 23CV006090

Notice is hereby given that Plaintiff Sherri J. Tenpenny, D.O., by and through her counsel, hereby dismisses and withdraws her October 20, 2023 Appeal, Tenth Appellate District of Franklin County, Ohio from final judgment entry of the Common Pleas Court of Franklin County entered on October 11, 2023.

Respectfully submitted,

/s/ Thomas Renz
Thomas Renz, Esq. (0098645)
Renz Law, LLC
1907 W. State St. #162

Fremont, OH 43420
(419) 351-4248
renzlawllc@gmail.com
Counsel for Appellant

/s/ Eric Jones
Eric A. Jones (0081670)
Jones Law Group, LLC
513 E. Rich Street
Columbus, OH 43215
Phone: (614) 545-9998
Fax: (614) 573-8690
ejones@joneslg.com
Counsel for Appellant

Franklin County Ohio Court of Appeals Clerk of Courts- 2023 Nov 21 5:31 PM-23AP000641

Franklin County Ohio Court of Appeals Clerk of Courts- 2023 Nov 21 5:31 PM-23AP000641

CERTIFICATE OF SERVICE

On this 21st day of November 2023, the undersigned counsel hereby certifies that a true and accurate copy of the foregoing Notice of Dismissal of Appeal was filed electronically and e-mail to the counsel below.

Melinda Ryans Snyder, Esq.
Assistant Attorney General
Health & Human Services Section
Office of Ohio Attorney General Dave Yost
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Melinda.RyansSnyder@OhioAGO.gov

_/s/ Thomas Renz_____
Thomas Renz, Esq. (0098645

/s/ Eric A. Jones_____
Eric A. Jones, Esq. (0081670)

Franklin County Ohio Clerk of Courts of the Common Pleas- 2023 Oct 20 4:02 PM-23CV006090
0A539 - V32

Franklin County Ohio Court of Appeals Clerk of Courts- 2023 Oct 23 8:42 AM-23AP000641

IN THE COURT OF COMMON PLEAS

FRANKLIN COUNTY, OHIO

SHERRI J. TENPENNY, D.O.	:	CASE NUMBER: 23CV6090
Appellant,	:	JUDGE: ANDY MILLER
vs.	:	
STATE MEDICAL BOARD OF OHIO	:	
	:	
Defendant/Appellee.	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Sherri J. Tenpenny, D.O., by and through her counsel, hereby appeals to the Court of Appeals, Tenth Appellate District of Franklin County, Ohio from final judgment entry of the Common Pleas Court of Franklin County entered on October 11, 2023.

Respectfully submitted,

/s/ Thomas Renz

Thomas Renz, Esq. (0098645)
Renz Law, LLC
1907 W. State St. #162
Fremont, OH 43420
(419) 351-4248
renzlawllc@gmail.com
Counsel for Appellant

Franklin County Ohio Clerk of Courts of the Common Pleas- 2023 Oct 20 4:02 PM-23CV006090
0A539 - V33

/s/ Eric A. Jones
Eric A. Jones, Esq. (0081670)
Jones Law Group, LLC
513 E. Rich Street
Columbus, Ohio 43215
(614) 545-9998
ejones@joneslg.com
Co-Counsel for Appellant

Franklin County Ohio Court of Appeals Clerk of Courts- 2023 Oct 23 8:42 AM-23AP000641

Franklin County Ohio Clerk of Courts of the Common Pleas- 2023 Oct 20 4:02 PM-23CV006090

Franklin County Ohio Court of Appeals Clerk of Courts- 2023 Oct 23 8:42 AM-23AP000641

CERTIFICATE OF SERVICE

On this 20th day of October 2023, the undersigned counsel hereby certifies that a true and accurate copy of the foregoing Notice of Appeal was filed electronically and mailed by regular mail and e-mail to the counsel below. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and electronic mail. Parties may access this filing through the Court's system.

James T. Wakley, Esq.
Principal Assistant Attorney General
Regulatory Boards Unit Coordinator
Health & Human Services Section
Office of Ohio Attorney General Dave Yost
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
James.Wakely@OhioAGO.gov

Melinda Ryans Snyder, Esq.
Assistant Attorney General
Health & Human Services Section
Office of Ohio Attorney General Dave Yost
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Melinda.RyansSnyder@OhioAGO.gov

/s/ Thomas Renz
Thomas Renz, Esq. (0098645

/s/ Eric A. Jones
Eric A. Jones, Esq. (0081670)

IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO
GENERAL DIVISION

SHERRI J. TENPENNY, D.O., **Appellant,** **v.** **STATE MEDICAL BOARD OF OHIO,** **Appellee.**	**Case No. 23 CV 6090** **JUDGE MILLER**

FINAL JUDGMENT ENTRY DISMISSING APPEAL FOR LACK OF SUBJECT-MATTER JURISDICTION
AND
GRANTING APPELLEE'S MOTION TO DISMISS (filed on September 14, 2023)

This is an R.C. 119.12 administrative appeal of an August 9, 2023 Entry of Order ("Order") of the Appellee State Medical Board of Ohio ("Medical Board"), which indefinitely suspended Appellant Dr. Sherri Tenpenny's license to practice medicine and surgery in the State of Ohio and fined her $4,000.00.

Appellee Medical Board mailed the Order to Dr. Tenpenny on August 9, 2023. *See* Notice of Appeal, p. 1 & Exh. A. On August 23, 2023 at 5:11 p.m., Eric A. Jones, Esq., counsel for Appellant, emailed "a copy of the Notice of Appeal" to James Wakley, Esq., AAG and Melinda Ryan Snyder, Esq, AAG of the Ohio Attorney General's Office. *See* Appellant's Opp. Mem p. 1 & Exh. A. On August 24, 2023, Appellant Dr. Tenpenny timely filed a Notice of Appeal with the Court. The Notice of Appeal included a Certificate of Service indicating that a copy of the Notice of Appeal "was served" on James T. Wakley, Esq., Principal Assistant Attorney General and Melinda Ryans Snyder, Eq., Assistant Attorney General "by email." On August 28, 2023, four

days later, James Wakley, Esq, AAG and Melinda Ryan Snyder, Esq., AAG, filed Notices of Appearance of Counsel for the Medical Board.

On September 14, 2023, the Medical Board filed a motion to dismiss this appeal for lack of subject matter jurisdiction based upon Appellant's failure to file a Notice of Appeal with the Medical Board within 15 days of the Medical Board's mailing of the Order. Appellant's motion for leave to file a memorandum in opposition *instanter* was granted and the memorandum was deemed timely filed on September 28, 2023. The Medical Board timely filed a reply memorandum on October 5, 2023.

For the reasons discussed below, the motion to dismiss is **GRANTED**. The Court lacks subject-matter jurisdiction because Dr. Tenpenny failed to strictly comply with R.C. 119.12(D), as she failed to file a notice of appeal with the Medical Board within 15 days of the Medical Board's mailing of its Order.

Applicable Law

Subject-matter jurisdiction is the statutory or constitutional power of a court to hear a case. *Nkanginieme v. Ohio Dept. of Medicaid*, 10th Dist. No. 14AP-596, 2015-Ohio-656, ¶15. In the context of administrative appeals, "[c]ourts of common pleas only have 'such powers of review of proceedings of administrative officers and agencies as may be provided by law.'" *Clifton Care Center v. Ohio Dept of Job & Family Servs.*, 10th Dist. No. 12AP-709, 2013-Ohio-2742, ¶9 (quoting Ohio Constitution Art. IV, Section 4). R.C. 119.12 authorizes appellants who disagree with an administrative decision to appeal to the court of common pleas pursuant to the procedures outlined in the statute.

R.C. 119.12(D) states, in relevant part:

> Any party desiring to appeal shall **file a notice of appeal with the agency** setting forth the order appealed from and stating that the agency's order is not supported

> by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice.
>
> Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section. (Emphasis added.)

Ohio Admn.Code 4731-13-08, a Medical Board administrative rule relied upon by Appellant, indicates the following regarding filing documents with the Board in the context of administrative hearings (not appeals to this Court):

> **(A)** A document is "filed" when it is received and time stamped in the offices of the board. For documents received via e-mail or through any electronic filing system implemented by the board, the time stamp provided by the board's computer shall be the time of receipt. Documents received after five p.m. eastern standard time shall not be considered for filing until the next business day.
> **(B)** An original of any document required to be served by Chapter 4731-13 of the Administrative Code shall be filed with the board not more than three days after service.
> **(C)** All filings shall be addressed to the board to the attention of its hearing unit. (Emphasis added).

The Supreme Court of Ohio has consistently held that failure to strictly comply with the filing requirements of R.C. 119.12 deprives the common pleas court of jurisdiction and is fatal to the appeal. *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 52, 2007–Ohio–2877, ¶ 7 ("a party adversely affected by an agency decision . . . must strictly comply with R.C. 119.12 in order to perfect an appeal."); *Zier v. Bureau of Unemployment Comp.* (1949), 151 Ohio St. 123, 84 N.E.2d 746, para. 1 of the syllabus. *See also Cyr v. State Medical Board of Ohio,* 10th Dist. No. 21AP-273, 2022-Ohio-25, ¶10, citing *Sun Refining & Marketing Co. v. Brennan*, 31 Ohio St.3d 306, 307, 511 N.E.2d 112 (1987). Specifically, the Tenth District Court of Appeals has held that failure to strictly comply with the requirement of "fil[ing] a notice of appeal with the appropriate

agency within the 15-day limit provided for in R.C. 119.12 results in a divestiture of subject-matter jurisdiction." *Bird v. Ohio State Racing Comm'n,* 10th Dist. No. 22AP-547, 2023-Ohio-1213, ¶10 quoting *Brass Pole v. Ohio Depart. of Health*, 10th Dist. No. 08AP-1110, 2009-Ohio-5021, ¶14 (dismissal of administrative appeal for failure to file the appeal with the Medical Board within the 15-day period set by R.C. 119.12) (citing cases).

Additionally, Ohio courts have acknowledged that, despite the harshness of the result, the failure to file a notice of appeal with the appropriate agency within the fifteen-day limit is a "jurisdictional defect." *Harrison v. Ohio State Medical Board,* 103 Ohio App.3d 317, 321, 659 N.E.2d 368 (10thDist. 1995); *Brass Pole,* supra at ¶13. *See Nibert v. Ohio Dep't of Rehab. & Corr.*, 84 Ohio St.3d 100, 102 (1998) (copies of the notice of appeal must be filed with the agency and the court within the fifteen-day limit or the court lacks jurisdiction to hear administrative appeal). Appellant does not contest that an untimely filing of the notice of the appeal with the Medical Board negates jurisdiction and requires dismissal of the appeal.

Discussion

In this appeal, the Medical Board asserts that Dr. Tenpenny failed to file a notice of appeal with the Medical Board because a notice of appeal was not timely received and time stamped in the offices of the Board. In response, Dr. Tenpenny argues that "filing the Notice of Appeal electronically" by sending/serving it via email to the Board's counsel in her administrative hearing before the Medical Board "was proper and effective . . . satisfying the filing requirements in R.C. 119.12(D)." Mem. in Opp. p. 2. Dr. Tenpenny also relies on the certificate of service attached to her notice of appeal filed with the Court, which indicates that the notice of appeal was sent to attorneys James Wakely, Esq., AAG and Melinda Ryans Snyder, Esq., AAG of the Ohio Attorney General's office. *Id.* In making this argument, Dr. Tenpenny incorrectly asserts that Mr. Wakely

and Ms. Ryans Snyder were counsel of record for the Medical Board in this administrative appeal at the time her attorney emailed them a copy of the Notice of Appeal. *Id.* They were not. The docket and electronic filing stamps of their notice of appearance establish that they did not make an appearance as counsel until August 28, 2023, four days after receiving a copy of the Notice of Appeal by email.

The Court rejects any contention by Appellant that sending her notice of appeal by electronic mail to the Ohio Attorney General and its attorneys constitutes a filing of the Notice of Appeal with the Medical Board and satisfies the requirements of R.C. 119.12(D) and Ohio Admn.Code 4731-13-08(A) & (C). "Service is legally distinct from filing and does not satisfy the requirements of the statute. Courts have consistently held that service upon an assistant attorney general, who represents an agency, does not satisfy the requirements of R.C. 119.12." *Evans v. Ohio Department of Ins.*, 5th Dist. No. 04 CA 80, 2005-Ohio-3921, ¶22. *See Blasko v. Ohio Board of Pharmacy,* 143 Ohio App.3d 191, 194, 2001-Ohio-3270 (7thDist. 2011); *Anda-Brenner v. Ohio State Dental Bd.*, 11th Dist. No. 99-P-0064, 2000 Ohio App. LEXIS 3700 (affirmed trial court's decision to grant Dental Board's motion to dismiss administrative appeal for lack of jurisdiction where notice of appeal was timely filed with the trial court, served on the assistant attorney general, counsel for the Board, on the same date, but not filed with the Board itself until later, after the filing deadline); *Prasad v. State,* Franklin Cty. C.P. Case No. 08CVF10-14552, unreported, 2010 Ohio Misc. LEXIS 4982 (August 3, 2010) ("The Court rejects any contention by Appellant that mailing a request for a hearing to the Attorney General constitutes a request to the Board. The law is clear that it does not."). *See also Salem Medical Arts & Development v. Columbiana Cty.* (1998), 80 Ohio St.3d 621, 1998-Ohio-657, ¶13 (because R.C. 5715.01 required that an appealing party serve the board of revision, service of a copy of the notice of appeal upon the board's counsel was

insufficient, and the appeal was properly dismissed); *Club 3000 v. Jones,* 10th Dist. No. 07AP-593, 598 & 599, 2008-Ohio-5058 (noting that "[i]n the context of an administrative appeal, when a statute directs an appealing party to serve a particular individual, service upon that individual's counsel has been held insufficient to invoke jurisdiction.").

As was clearly held in *Blasko v. Ohio Bd. of Pharmacy* and the multiple Court of Appeals decisions cited in *Blasko*, the duty in filing a timely notice of appeal with the Board rests with the Appellant, not the Attorney General, assistant attorney generals representing the Board, or opposing counsel. 143 Ohio App.3d 191, 194-95, 2001-Ohio-3270 (7thDist.) (service on the Assistant Attorney General and "service on the attorney representing the agency within the fifteen-day time frame for filing the notices of appeal does not constitute timely filing with the agency under R.C. 119.12."), appeal denied by *Blasko v. Ohio Bd. of Pharmacy* (2001), 93 Ohio St.3d 1413, 754 N.E.2d 260.

Further, although the docket shows that Appellant Dr. Tenpenny filed a request for certified mail service of her Notice of Appeal on the Medical Board with the Clerk of Courts on August 24, 2023, which certified mail service was issued by the Clerk of Courts on August 28, 2023, the Notice of Appeal was not delivered to the Medical Board's offices via certified mail until August 30, 2023. *See* September 6, 2023 "Service Complete - Certified Mail" filing of the signed return of service with the Court. Appellant's deadline for timely filing a Notice of Appeal with the Medical Board was August 24, 2023. As a result, Appellant's certified mail service on the Medical Board on August 30, 2023 was untimely under R.C. 119.12(D).

Nor is the "mailbox" service rule available to cure Appellant's untimely filing of her Notice of Appeal with the Medical Board. The Tenth District Court of Appeals has expressly rejected the "mailbox rule" in statutory administrative appeals. *Brass Pole,* supra at ¶14

("Depositing the notice of appeal in the mail does not constitute a filing under R.C. 119.12. To be timely filed, a notice of appeal must be received within the time period set forth in R.C. 119.12."); *Frasca v. State Bd. of Chiropractic Examiners* (July 30, 1998), 10th Dist. No. 97AP-137, unreported, 1998 Ohio App. Lexis 3467 (the mailbox rule has no application to jurisdictional requirements of timeliness in filing an administrative appeal). *See also Lehman v. Ohio BMV,* Franklin Cty. C.P. No. 15CVF-03-1884 (Serrott, J.), 2015 Ohio Misc. LEXIS 14635. It is irrelevant when Appellant requested certified mail service of the Medical Board as well as when the Clerk of Courts sent a copy of the Notice of Appeal by certified mail to the Medical Board. The only consideration for this Court is when the Notice of Appeal was received by and filed with the Medical Board. In this appeal, the Medical Board did not receive the certified mail copy of the Notice of Appeal until four days after the filing deadline of R.C. 119.12.

Ohio law requires strict compliance with the dictates of R.C. 119.12. Dr. Tenpenny's Notice of Appeal had to be <u>received</u> and filed with the Medical Board and the Court within the 15-day period set forth in R.C. 119.12(D). Service of the Notice of Appeal on Assistant Attorney Generals who represented the Medical Board at the administrative hearing as well as a request for certified mail service of the Notice of Appeal to the Medical Board do not constitute filing the Notice of Appeal with the Medical Board under R.C. 119.12. Appellant Dr. Tenpenny's failure to timely file her Notice of Appeal with the Medical Board is fatal to this Court's jurisdiction over Appellant's administrative appeal brought pursuant to R.C. 119.12. *See Black v. Ohio Department of Developmental Disabilities,* 10th Dist. No. 23AP-142, 2023-Ohio-3640, ¶¶26-32.

Decision

Appellant Dr. Tenpenny failed to strictly comply with the mandatory requirements of R.C. 119.12(D) by timely filing her notice of appeal with the Medical Board. Appellant Dr. Tenpenny failed to invoke this Court's subject-matter jurisdiction. Appellee Medical Board's Motion to Dismiss filed on September 14, 2023 is hereby **GRANTED**.

The appeal is **DISMISSED WITH PREJUDICE.** Costs taxed to Appellant.

THE COURT FINDS THAT THERE IS NO JUST REASON FOR DELAY. THIS IS A FINAL APPEALABLE ORDER. Pursuant to Civil Rule 58, the Clerk of Court shall serve notice of this judgment and its date of entry upon all parties.

IT IS SO ORDERED.

Electronically Signed

JUDGE ANDY MILLER

COPIES TO: Counsel of record

Franklin County Court of Common Pleas

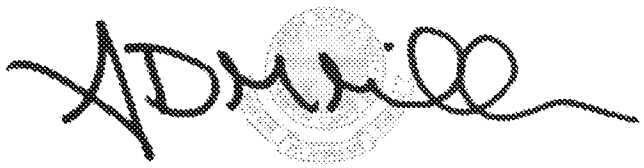
Date: 10-11-2023

Case Title: SHERRI J TENPENNY -VS- STATE MEDICAL BOARD OF OHIO

Case Number: 23CV006090

Type: JUDGMENT ENTRY

It Is So Ordered.



/s/ Judge Andrew D.M. Miller

Court Disposition

Case Number: 23CV006090

Case Style: SHERRI J TENPENNY -VS- STATE MEDICAL BOARD OF OHIO

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 23CV0060902023-09-1499980000
   Document Title: 09-14-2023-MOTION TO DISMISS - DEFENDANT: STATE MEDICAL BOARD OF OHIO
   Disposition: MOTION GRANTED

IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO
GENERAL DIVISION

SHERRI J. TENPENNY, D.O., **Appellant,** **v.** **STATE MEDICAL BOARD OF OHIO,** **Appellee.**	**Case No. 23 CV 6090** **JUDGE MILLER**

DECISION AND ENTRY DENYING APPELLANT'S MOTION TO STAY THE AUGUST 9, 2023 ENTRY OF ORDER OF THE STATE MEDICAL BOARD (filed on AUGUST 29, 2023)

This is an R.C. 119.12 administrative appeal of an August 9, 2023 Entry of Order ("Order") of the Appellee State Medical Board of Ohio ("Medical Board"), which indefinitely suspended Appellant Dr. Sherri Tenpenny's license to practice medicine and surgery in the State of Ohio. The Board found that Dr. Tenpenny failed to cooperate in a Medical Board investigation and that her license to practice medicine and surgery should be suspended until such time as she cooperates as outlined in Medical Board's Order.

Appellant's August 29, 2023 Motion to Stay and her assertions of undue hardship are not supported by an affidavit or any evidence except the Medical Board's Order and the Report and Recommendations of the Medical Board's Hearing Examiner. The motion to stay is opposed by the Medical Board, which filed a Memorandum in Opposition on September 1, 2023. Appellant filed a Reply Memorandum on September 7, 2023. For the reasons stated below, the motion to stay is **DENIED**.

R.C. 119.12(E) provides as follows:

> The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency.. . . In the case of an appeal from . . . the state medical board, . . . the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health safety and welfare of the public will not be threated by suspension of this order.

Even if an Appellant establishes that he or she would suffer an unusual hardship and that the health, safety, and welfare of the public is not threatened if the Medical Board's Order is stayed, R.C. 119.12(E) does not mandate or require that the Court suspend the Medical Board's Order. R.C. 119.12(E) simply reserves to the discretion of the Court the ability to stay an agency order if the Court finds an unusual hardship to the Appellant and no threat to the public. R.C. 119.12(E) ("the court **may** grant a suspension . . .") (emphasis added); *Khemsara v. Ohio Veterinary Medical Licensing Bd.,* 8th Dist. No. 110945, 2022-Ohio-833, ¶ 15, quoting *Lots of Love, Inc. v. Ohio Dept. of Dev. Disabilities,* 9th Dist. No. 28531, 2018-Ohio-371, ¶ 5.

Appellant's Claim Of Unusual Hardship

"Unusual hardship" is not defined in R.C. 119.12(E). Instead, in *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC*, 141 Ohio App.3d 777, 782-83 (10thDist. 2001), the Tenth District Court of Appeals held that a trial court has discretion in determining whether there is an unusual hardship that warrants the granting of a stay.

The Tenth District identified four factors for this Court to consider when determining whether to stay an administrative order pending judicial review: (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that he/she will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay. *Id.* at p. 783. Additionally, "[w]hen asked to stay an administrative order, courts give significant weight to the

expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme." *Id.*, citing *Hamlin Testing Labs, Inc. v. United States Atomic Energy Comm.*, 337 F.2d 221 (1964). These factors are not perquisites that must be met but are interrelated considerations that must be balanced together. *Prince-Paul v. Ohio Bd. of Nursing*, 10th Dist. No. 15AP-62, 2015-Ohio-3984, ¶13.

A. **Public Interest Factors**

The Court finds that the underlying disciplinary proceeding does not relate to patient care or medical care. Nonetheless, the Medical Board asserts that the issuance of a stay will cause harm to others and will not serve the public interest because Dr. Tenpenny was disciplined for her failure to cooperate in a Medical Board investigation that was opened after Board received approximately 350 complaints about Dr. Tenpenny. The Medical Board also asserts, without any support, that it has evidence that suggests that Dr. Tenpenny committed violations of the Medical Practice Act (R.C. 4721 et seq.). Mem. in Opp. p. 1, 5-6. Appellant, on the other hand, asserts that the Medical Board has made no specific allegations that her continued practice would cause harm to others. Appellant also argues that complying with what she believes are unlawful Medical Board orders without judicial review would be a surrendering of her constitutional rights. Reply Mem. 6-7. Without the record on appeal, however, the Court is not convinced that the issuance of a stay would serve the public interest.

B. **Probability of Success on The Merits**

It is well established Ohio law that if an agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law, this Court can only affirm and cannot reverse, vacate, or modify the agency order. *Henry's Café, Inc. v. Board of Liquor Control,* 170 Ohio St. 233, 236, 163 N.E.2d 678 (1959); *University of Cincinnati v. Conrad,* 63 Ohio St.2d 108,

111, 407 N.E.2d 1265 (1980) (an administrative appeal to the common pleas court does not provide a trial de novo); R.C. 119.12(M). Without the record on appeal and considering *Henry's Café, Inc., supra*, the Court is not able to determine at this time that Appellant has established a substantial likelihood or probability of success on the merits.

C. **Irreparable Injury**

In this appeal, Dr. Tenpenny asserts that she "shall suffer an unusual hardship by having her Ohio medical license suspended and by having to report the existence of the Order to numerous" unidentified and unnamed entities and that the Entry of Order will "effectively deprive [sic] of her right to judicial review." Mot. p. 1. Dr. Tenpenny also argues, without the support of an affidavit, that her suspension will subject her an irreparable injury in the form of "an unusual and irreparable loss of her business, income, privacy and professional status." *Id.* She claims she will be forced to completely close her private practice and terminate all her patients. Mem. in Support, p. 6.

"Unusual hardship" warranting a stay of a Medical Board order must be more than the loss of the right to practice one's profession and loss of income. *See D'Souza v. State Med. Bd. of Ohio,* Franklin Cty. C.P. No. 08CVF05-7342 (June 12, 2008); *Ange v. State Med. Bd. of Ohio,* Franklin Cty. C.P. No. 19CVF-07-6043, p. 5 (August 12, 2019) (J., O'Donnell) ("Losing one's income and even medical practice does not constitute the kind of unusual hardship that warrants a stay. . . . financial hardship is not unusual in situations where a professional license is revoked."). Proof of an undue hardship "'usually requires some extraordinary circumstances'" and "extraordinary" harm resulting from operation of an administrative order pending determination of the appeal. *deBourbon v. State Med. Bd. of Ohio*, 10th Dist. No. 16AP-669, 2017-Ohio-5526, ¶¶ 9-10 (Appellant's contention in his affidavit that he would suffer a "disastrous financial loss," including the likely loss of his practice, his home, and his ability to provide for his family if the court did not

grant a stay of the suspension of his medical license pending the determination of his appeal, did "not rise to the level of extraordinary circumstances" required to establish unusual hardship under R.C. 119.12(E) because "[t]hey are unfortunate but predictable harms that would result whenever any physician has his or her license suspended for an extended period of time."). *See Prince-Paul v. Ohio Bd. of Nursing,* 10th Dist. No. 15AP-62, 2015-Ohio-3984, ¶ 14 (likening "unusual hardship" under R.C. 119.12(E) to the "extraordinary circumstances" required to establish "undue hardship" in determining whether a stay is appropriate in federal bankruptcy proceedings). As the Tenth District Court of Appeals has found, the loss of a medical practice, home, and ability to provide for one's family, "do not rise to the level of extraordinary circumstances." *deBourbon,* supra at ¶10. "They are unfortunate but predictable harms that would result whenever any physician has his or her license suspended for an extended period of time." *Id.*

Here, although Appellant may suffer financial consequences from the suspension of her medical license and she may be required to report the Medical Board's Order to unidentified licensing agencies/entities, she has not shown that she will suffer unusual hardship through an irreparable injury as required under R.C. 119.12(E). First, Appellant offered no affidavit or evidence in support of her motion and claims of undue hardship. Second, the alleged financial harms and reporting requirements complained of by Appellant are predictable harms that would result whenever a physician has his or her license suspended for an extended period of time. They do not rise to the level of extraordinary circumstances required for a finding of undue hardship under controlling precedent of the Tenth District Court of Appeals. Nor do Appellant's unsupported claims of loss of privacy and professional status go beyond the predictable harms of an indefinite suspension of a medical license and rise to the level of extraordinary circumstances warranting a finding of undue hardship.

Third, although Appellant asserts that the Medical Board's Order will "effectively deprive her of her right to judicial review" if it is not stayed, she offers no argument as to how her right to an appeal pursuant to R.C. 119.12 is threaten. Specifically, Appellant fails to demonstrate that without a stay of the Medical Board's Order her right to appeal would be destroyed in the interim, depriving her of her right to judicial review. *See, e.g., Ohio CVS Stores LLC v. Ohio Liquor Control Commission*, Franklin Cty. C.P. No. 22CVF-2380 (April 20, 2022) (J., Miller) (Unusual hardship under R.C. 119.12(E) established when Appellant demonstrated that an 8-day license suspension would be concluded before the merits of its appeal were decided, rendering the appeal moot and effectively destroying Appellant's right to judicial review).

The Court finds that there is no possibility that the indefinite suspension of Dr. Tenpenny's medical license will end before the merits of her appeal are decided and there is no possibility that Appellant's appeal will be rendered moot. Consequently, the Court finds that denial of the motion to stay will not effectively deprive Appellant of her right to appeal and to challenge the Medical Board's Order. Without a stay of the Medical Board's Order, Appellant's right to appeal "what she views to be unlawful Board Orders" (Reply Mem. p. 6) remains unfettered subject to the statutory conditions of R.C. 119.12. Additionally, Appellant's constitutional rights, including freedom of speech and due process, will not be violated if her motion to stay is not granted. As a result, the Court finds that denial of Appellant's motion to stay will not effectively deprive Dr. Tenpenny of her right to judicial review.

Accordingly, this Court finds and concludes Appellant's motion to stay does not demonstrate extraordinary circumstances and irreparable injury that are an unusual hardship under R.C. 119.12(E) warranting a stay of the Medical Board's Entry of Order dated August 9, 2023.

For the foregoing reasons, Appellants' Motion to Stay is **DENIED.** The State Medical Board of Ohio's Entry of Order dated August 9, 2023 is not stayed during the pendency of this administrative appeal.

IT IS SO ORDERED.

Electronically Signed

JUDGE ANDY MILLER

COPIES TO:
Counsel of record

Franklin County Court of Common Pleas

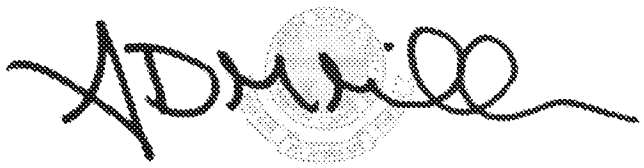
Date: 09-15-2023

Case Title: SHERRI J TENPENNY -VS- STATE MEDICAL BOARD OF OHIO

Case Number: 23CV006090

Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge Andrew D.M. Miller

Court Disposition

Case Number: 23CV006090

Case Style: SHERRI J TENPENNY -VS- STATE MEDICAL BOARD OF OHIO

Motion Tie Off Information:

1. Motion CMS Document Id: 23CV0060902023-08-2999980000
   Document Title: 08-29-2023-MOTION TO STAY - PLAINTIFF: SHERRI J. TENPENNY
   Disposition: MOTION DENIED

State Medical Board of Ohio

30 E. Broad St., 3rd Floor
Columbus, Ohio 43215
(614) 466-3934
www.med.ohio.gov

August 9, 2023

Sherri J. Tenpenny, D. O.
7380 Engle Road
Middleburg Heights, OH 44130

RE: Case No. 22-CRF-0168

Dear Dr. Tenpenny:

Please find enclosed certified copies of the Entry of Order; the Report and Recommendation of Kimberly A. Lee Esq., Hearing Examiner, State Medical Board of Ohio; and an excerpt of draft Minutes of the State Medical Board, meeting in regular session on August 9, 2023, including motions approving and confirming the Report and Recommendation as the Findings and Order of the State Medical Board of Ohio.

Section 119.12, Ohio Revised Code, may authorize an appeal from this Order. Any such appeal must be filed in accordance with all requirements specified in Section 119.12, Ohio Revised Code, and must be filed with the State Medical Board of Ohio and the Franklin County Court of Common Pleas within (15) days after the date of mailing of this notice.

THE STATE MEDICAL BOARD OF OHIO

Kim G. Rothermel MD

Kim G. Rothermel, M.D.
Secretary

KGR:jlm
Enclosures

CERTIFIED MAIL NO - 9414 8149 0315 2968 0285 89
RETURN RECEIPT REQUESTED

CC via USPS: Eric A. Jones, Esq.
Jones Law Group, LLC
513 E. Rich Street
Columbus, OH 43215

CC via USPS: Thomas Renz
1907 W. State Street #162
Fremont, OH 43420

Mailed 8/10/23

CERTIFICATION

I hereby certify that the attached copy of the Entry of Order of the State Medical Board of Ohio; Report and Recommendation of Kimberly A. Lee, Esq., State Medical Board Hearing Examiner; and excerpt of draft Minutes of the State Medical Board, meeting in regular session on August 9, 2023, including motions approving and confirming the Findings of Fact, Conclusions and Proposed Order of the Hearing Examiner as the Findings and Order of the State Medical Board of Ohio; constitute a true and complete copy of the Findings and Order of the State Medical Board in Sherri J. Tenpenny, D.O., Case No. 22-CRF-0168 as it appears in the Journal of the State Medical Board of Ohio.

This certification is made by authority of the State Medical Board of Ohio and in its behalf.

Kim G. Rothermel, M.D.
Secretary

(SEAL)

August 9, 2023
Date

BEFORE THE STATE MEDICAL BOARD OF OHIO

IN THE MATTER OF	*	
	*	CASE NO. 22-CRF-0168
SHERRI J. TENPENNY, D. O.	*	

ENTRY OF ORDER

This matter came on for consideration before the State Medical Board of Ohio on August 9, 2023.

Upon the Report and Recommendation of Kimberly A. Lee, Esq., State Medical Board Hearing Examiner, designated in this Matter pursuant to R.C. 4731.23, a true copy of which Report and Recommendation is attached hereto and incorporated herein, and upon the approval and confirmation by vote of the Board on the above date, the following Order is hereby entered on the Journal of the State Medical Board of Ohio for the above date.

It is hereby ORDERED that:

A. **SUSPENSION OF LICENSE**: The license of Sherri J. Tenpenny, D.O., to practice osteopathic medicine and surgery in the State of Ohio shall be SUSPENDED for an indefinite period of time.

B. **FINE**: Within thirty days of the effective date of this Order, Dr. Tenpenny shall remit payment in full of a fine of three thousand dollars ($3,000). Such payment shall be made via credit card in the manner specified by the Board through its online portal, or by other manner as specified by the Board.

C. **CONDITIONS FOR REINSTATEMENT OR RESTORATION**: The Board shall not consider reinstatement or restoration of Dr. Tenpenny's license to practice osteopathic medicine and surgery until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration**: Dr. Tenpenny shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.

2. **Payment of Fine**: Dr. Tenpenny shall have fully paid the fine as set forth in Paragraph B of this Order.

3. **Certification of Cooperation with Board Investigation**: Dr. Tenpenny shall submit a written statement from the Board's Enforcement Division that Dr. Tenpenny has fully complied with all subpoenas and interrogatories issued to her by the Board.

4. **Additional Evidence of Fitness To Resume Practice**: In the event that Dr. Tenpenny has not been engaged in the active practice of osteopathic medicine and surgery for a period in excess of two years prior to application for reinstatement or restoration, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of her fitness to resume practice.

D. **VIOLATION OF THE TERMS OF THIS ORDER**: If Dr. Tenpenny violates the terms of this Order in any respect, the Board, after giving her notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of her license.

E. **REQUIRED REPORTING TO THIRD PARTIES; VERIFICATION**:

1. **Required Reporting to Employers and Others**: Within 30 days of the effective date of this Order, Dr. Tenpenny shall provide a copy of this Order to all employers or entities with which she is under contract to provide healthcare services (including but not limited to third-party payors), or is receiving training, and the Chief of Staff at each hospital or healthcare center where she has privileges or appointments. Further, Dr. Tenpenny shall promptly provide a copy of this Order to all employers or entities with which she contracts in the future to provide healthcare services (including but not limited to third-party payors), or applies for or receives training, and the Chief of Staff at each hospital or healthcare center where she applies for or obtains privileges or appointments.

   In the event that Dr. Tenpenny provides any healthcare services or healthcare direction or medical oversight to any emergency medical services organization or emergency medical services provider in Ohio, within 30 days of the effective date of this Order, she shall provide a copy of this Order to the Ohio Department of Public Safety, Division of Emergency Medical Services.

   Further, within 30 days of the date of each such notification, Dr. Tenpenny shall provide documentation acceptable to the Secretary and Supervising Member of the Board demonstrating that the required notification has occurred.

2. **Required Reporting to Other Licensing Authorities**: Within 30 days of the effective date of this Order, Dr. Tenpenny shall provide a copy of this Order by certified mail to the proper licensing authority of any state or jurisdiction in which she currently holds any professional license, as well as any federal agency or entity, including but not limited to the Drug Enforcement Administration, through which she currently holds any professional license or certificate. Also, Dr. Tenpenny shall provide a copy of this Order by certified mail at the time of application to the proper licensing authority of any state or jurisdiction in which she applies for any professional license or reinstatement/restoration of any professional license.

   Additionally, within 30 days of the effective date of this Order, Dr. Tenpenny shall provide a copy of this Order to any specialty or subspecialty board of the American Board of Medical Specialties or the American Osteopathic Association Bureau of Osteopathic Specialists under which she currently holds or has previously held certification.

   Further, within 30 days of the date of each such notification, Dr. Tenpenny shall provide documentation acceptable to the Secretary and Supervising Member of the Board demonstrating that the required notification has occurred.

This Order shall become effective immediately upon the mailing of the notification of approval by the Board.

Kim G. Rothermel, M.D.
Secretary

(SEAL)

August 9, 2023
Date

July 14, 2023

BEFORE THE STATE MEDICAL BOARD OF OHIO

In the Matter of	*	
		Case No. 22-CRF-0168
Sherri J. Tenpenny, D.O.,	*	
Respondent.	*	**Hearing Examiner Lee**

REPORT AND RECOMMENDATION

Basis for Hearing:

In a Notice of Opportunity for Hearing dated September 14, 2022 ("Notice"), the State Medical Board of Ohio ("Board") notified Sherri J. Tenpenny, D.O., that it proposed to take disciplinary action against her license to practice osteopathic medicine and surgery in Ohio. The Board based its proposed action on allegations that Dr. Tenpenny failed to respond to an investigator's attempts to contact her, failed to respond to interrogatories from the Board, failed to appear at a deposition, and failed to appear at an investigative office conference.

The Board further alleged that Dr. Tenpenny's acts, conduct, and/or omissions, individually, and/or collectively, constitute "[f]ailure to cooperate in an investigation conducted by the board under division (F) of this section, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board in an investigative interview, an investigative office conference, at a deposition, or in written interrogatories," as that clause is used in Ohio Revised Code Section ("R.C.") 4731.22(B)(34). (State's Exhibit ("St. Ex.") 1)

Accordingly, the Board advised Dr. Tenpenny of her right to request a hearing and received her written request on October 5, 2022.

Appearances:

Dave Yost, Attorney General of Ohio, and Melinda R. Snyder and James T. Wakley, Assistant Attorneys General, for the State of Ohio. Dr. Tenpenny was represented by Eric Jones, Esq., and Thomas Renz, Esq. However, only Mr. Jones appeared for the first day of hearing, and no one appeared on Dr. Tenpenny's behalf on the second day of hearing.

Hearing Dates: April 7 and 19, 2023

PROCEDURAL MATTER

1. As permitted by statute, Dr. Tenpenny submitted her defense in writing. Included in that defense were a number of exhibits, including an affidavit from Mr. Renz, one of her attorneys. Mr. Renz was not called as a witness and was not subject to cross-examination so that affidavit was not admitted to the record and was held as a proffer.

2. There were a number of filings regarding redactions to State's Exhibit 3 and Dr. Tenpenny's written defense. The final order regarding redactions was that none of those documents would contain any redactions.

3. Neither of Dr. Tenpenny's attorneys nor Dr. Tenpenny herself appeared for the second day of hearing on April 19, 2023, despite the parties' agreement upon that date as the second hearing day. Subsequently, Dr. Tenpenny, through counsel, made several filings requesting the record be reopened. Counsel argued lack of notice as to the second hearing date as well as good cause to reopen due to a back injury. The request was denied on the basis that counsel received sufficient notice as counsel participated in the selection of the second hearing date, acknowledged on the record during the first day of hearing the agreed upon date for the second day of hearing, and was sent an email from the Board's virtual hearing platform regarding the second hearing date. As for good cause, Dr. Tenpenny's counsel initially informed the hearing examiner and the State that he had been hospitalized. However, he later clarified that he suffered a back injury on Sunday, saw a chiropractor on Monday and Tuesday, rested on Wednesday (the second day of hearing), and was seen in an emergency room on Thursday. Counsel also admitted that the April 19, 2023 hearing date was not on his calendar. All requests to reopen the record were denied.

4. Several exhibits lacked labels and/or pages numbers. The hearing examiner added labels and page numbers where appropriate.

SUMMARY OF THE EVIDENCE

All exhibits and the transcript of testimony, even if not specifically mentioned, were thoroughly reviewed and considered by the Hearing Examiner prior to preparing this Report and Recommendation.

Background

1. Sherri J. Tenpenny, D.O., graduated from the Kirksville College of Osteopathic Medicine in 1984. After completing a rotating internship at Michigan Osteopathic Medical Center, Dr. Tenpenny began working at Blanchard Valley Regional Health Center in Findlay, Ohio in 1986. She remained at Blanchard until 1998 and held several positions over the years including Chief of Family Practice/Emergency Medicine and Director of the Emergency Medicine Department. Since 1994, Dr. Tenpenny has also worked at what is currently

known as Tenpenny Integrative Medical Center which is described as "Combining MD, DO, DC, and L.Ac, - emphasis chronic conditions, allergies and women's health." (Respondent's Written Response ("Resp. Wr. Resp.") - Exhibit ("Ex.") A at 1)

2. Dr. Tenpenny was initially licensed to practice osteopathic medicine and surgery in Ohio in 1984. Her license is currently active. (St. Ex. 11) Dr. Tenpenny has been certified in holistic and integrative medicine by ABHIM since 2012 and in osteopathic neuromusculoskeletal medicine by AOBNMM since 1995. (Respondent's Written Response - Exhibit ("Ex.") A at 1) Dr. Tenpenny was board certified in emergency medicine from 1986 to 1998. (Resp. Wr. Resp.at 3 and Ex. A at 8)

3. In addition to her medical practice, Dr. Tenpenny has authored multiple books, columns, and articles, appeared on local, national, and international television networks, participated in various documentaries and DVD productions, and been interviewed on a myriad of radio programs. (Resp. Wr. Resp. - Ex. A at 3-5) In addition, Dr. Tenpenny's curriculum vitae lists numerous presentations and experiences in consulting. (Resp. Wr. Resp. - Ex. A)

Board Investigation into Dr. Tenpenny

4. Marcie Pastrick testified that she has been an enforcement attorney for the Board for 22 years and that her job duties include investigating complaints assigned to her in order to develop the investigation towards a resolution. She further explained that an "investigation can include interrogatories, depositions, office conferences, interviewing witnesses, asking investigators to interview witnesses." (Hearing Transcript ("Tr.") at 13-14)

5. Ms. Pastrick explained that investigations are triggered by complaints received by the Board and that the Board received approximately 350 complaints regarding Dr. Tenpenny. She further explained that the Board had evidence that appeared to show Dr. Tenpenny had violated the Medical Practice Act[1]. (Tr. at 14, 16) She later testified that at least some of the complaints made allegations that, if true, would be violations of R.C. 4731.22(B). (Tr. at 54-55) Ms. Pastrick stated that the possible violations of R.C. 4731.22(B) would "depend on what the investigations uncovered or what evidence showed through investigations." (Tr. at 56)

6. Ms. Patrick explained that "[w]hen the Board is attempting to investigate a licensee and we attempt to contact them several times through different methods, personal interview, email, phone calls, deposition, interrogatories, and a failure to respond to any of those attempts would be considered a failure to cooperate," and that the Board seldom acts "on one failure to respond." (Tr. at 30)

[1] R.C.4731 is also known as the Medical Practice Act.

Attempted Contact by Board Investigator

7. On July 21, 2021, Jason Alameda, a Board Enforcement Investigator sent the following email to Dr. Tenpenny at stenpenny@tenpennyimc.com:

> Dr. Tenpenny, please contact me at your earliest convenience, as I would like to schedule a date and time to speak with you in regards to a matter that has been referred to the State Medical Board. I dropped a business card [off] for you at your practice last week (on 7/14/21) and wanted to ensure that you had received it. Feel free to contact me via email or telephone to arrange a time. I will be unavailable the week of 7/26 through 7/30, but will have openings beginning 8/2. Thanks very much in advance.

(St. Ex. 10 at 2)

8. Ms. Pastrick testified that Mr. Alameda attempted to speak with Dr. Tenpenny but left his business card with the receptionist when informed Dr. Tenpenny was not available. Ms. Patrick admitted that it was not certain that Dr. Tenpenny had received the business card. (Tr. at 16, 32)

9. Ms. Pastrick testified that Mr. Alameda did not receive a response to his email. She explained that email addresses are obtained from licensees and that licensees are statutorily required to update their contact information within 30 days of any change.[2] (Tr. at 17) Ms. Pastrick also testified that, to the best of her recollection, Mr. Alameda informed her that he had an receipt showing his July 21, 2021 email had been received, but she also admitted it was possible the email went into Dr. Tenpenny's junk folder or was not actually received. (Tr. at 33-34)

10. In her affidavit, Dr. Tenpenny swore that she first became aware of the Board's attempts to contact her when she received a letter from the Board dated August 11, 2021 so it appears she did not see the email from Mr. Alameda or the card he left with the receptionist. (Resp. Wr. Resp. – Ex. B at 1)

Interrogatories

11. On September 7, 2021, Ms. Pastrick mailed to Dr. Tenpenny the Board's First Set of Interrogatories ("Interrogatories"). The Interrogatories were mailed to Dr. Tenpenny's address of record by certified mail. (St. Ex. 2 at 2-24; St Ex. 9; Tr. at 18) Tracking information from the United States Postal Services shows that the Interrogatories were delivered on September 9, 2021. (St. Ex. 2 at 25-26) The Interrogatories asked for information regarding Dr. Tenpenny's practice in general as well as asking specifically

[2] R.C. 4731.281(F) - Each person holding a license to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery shall give notice to the board of a change in the license holder's residence address, business address, or electronic mail address not later than thirty days after the change occurs.

about her practice regarding recommendations concerning, and administration of, vaccines and whether any of her patients subsequently contracted certain illnesses. The Interrogatories also specifically ask how many doses of COVID-19 vaccines she had provided and whether she had personally received a COVID-19 vaccine. (St. Ex. 2 at 7-16)

The Interrogatories also asked Dr. Tenpenny what scientific evidence she had, and specifically asked that she cite her sources for this evidence, regarding COVID-19 vaccines causing people to become magnetized or creating an interface with 5G towers; regarding the COVID-19 vaccine not injecting a real virus but strips of genetic material and patients suffering complications such as abnormal bleedings, myocarditis, strokes, and neurological complications; and regarding some major metropolitan areas liquifying dead bodies and pouring them into the water supply. (St. Ex. 2 at 18-19) Dr. Tenpenny's responses to the Interrogatories were due by October 8, 2021. (St. Ex. 2 at 2-3)

12. The Interrogatories also include the following statements:

> Please note that these interrogatories involve an investigation by the Board and that failure to cooperate may result in discipline of a licensee pursuant to §4731.22(B)(34), Ohio Revised Code.

(St. Ex. 2 at 3)

> If you enter an objection and refuse to answer any interrogatory in whole or in part, describe the basis for the lack of a response in sufficient detail so as to permit a court to determine the validity of said refusal.

(St. Ex. 2 at 4)

> Failure to answer as instructed without substantial justification may render you subject to an Order compelling the information sought by these interrogatories and may render you or your attorney liable for the expenses of a motion.

(St. Ex. 2 at 4)

> To the extent that you believe any of the interrogatories are objectionable, answer so much of the interrogatory and each subpart thereof that is not objectionable, and separately state the objection and each ground for each such objection as to each subpart.

(St. Ex. 2 at 5-6)

13. In a letter dated September 20, 2021, Thomas Renz, Esq., of Renz Law, LLC., the only licensed attorney who signed the letter[3], objected to the Interrogatories in their entirety, as well as an August 11, 2021 letter from the Board regarding a method of investigation into a potential violation of R.C. 4731.22 which is not part of the Notice. (St. Ex. 3) While much of the letter addresses an issue which is not the subject of the current case, as to the Interrogatories, Mr. Renz, wrote, "The September 7th Interrogatories are invasive, irrelevant to any inquiry into [redacted] (St. Ex. 3 at 3) Mr. Renz further wrote that Dr. Tenpenny would not respond to the Interrogatories and asserted that "[d]eclining to cooperate in the Board's bad faith and unjustified assault on her licensure, livelihood, and constitutional rights cannot be construed as an admission of any allegations against her." (St. Ex. 3 at 3) Mr. Renz also wrote that most of Dr. Tenpenny's statements which were quoted in the August 11, 2021 letter[4] were "based on factual reports by third parties – including peer-reviewed studies published in mainstream medical journals." (St. Ex. 3 at 2)

14. At hearing, Ms. Pastrick testified that the Board did not respond to Mr. Renz regarding the objections raised in the September 20, 2021 letter and did not file with an appropriate court to determine the validity of the refusal or to obtain an order to compel Dr. Tenpenny to answer. (Tr. at 40-41)

Deposition

15. On October 12, 2021, the Board issued a subpoena to Dr. Tenpenny which commanded her to appear at the Board's offices on November 3, 2021 for an investigatory deposition. (St. Ex. 4 at 1-2) The letter that accompanied the subpoena included the following warning:

> Please note that Sections 4730.25(B)(22), 4731.22(B)(34), 4759.07(A)(19), 4760.13(B)(20), 4761.09(A)(19), 4762.13(B)(21), 4774.13(B)(20), and/or 4778.14(B)(19), Ohio Revised Code, impose an obligation to cooperate in an investigation conducted by the board. This includes complying with a subpoena and answering truthfully questions presented by the Board at a deposition. As such, the failure to cooperate with a Medical Board investigation, including failure to appear for a deposition, is grounds for discipline.

(St. Ex. 4 at 1)

16. The subpoena was sent to Dr. Tenpenny at her address of record by certified mail, and a copy was also sent to Mr. Renz by certified mail. Tracking documentation shows that the subpoena was delivered to both Dr. Tenpenny and Mr. Renz on October 15, 2021. (St. Ex. 4)

---

[3] The September 20, 2021 letter is also signed by Kristen Stoicescu. However, the hearing examiner was unable to locate Ms. Stoicescu in the Supreme Court of Ohio's attorney directory. < https://www.supremecourt.ohio.gov/attorneysearch/#/search> search term "Stoicescu", accessed July 8, 2023

[4] The August 11, 2021 letter is not part of the hearing record.

17. By letter dated October 31, 2021, Mr. Renz[5] wrote, ". . . Dr. Tenpenny is in no way obligated to and will not cooperate in the Board's bad faith and unjustified assaults on her licensure, livelihood, and constitutional rights." (St. Ex. 5 at 1) Mr. Renz incorporated the claims and defenses made in his September 20, 2021 letter and made several additional legal arguments. He argued that there were no legal grounds for the Board's investigation as the Board had not presented the basis to Dr. Tenpenny, and he cited to R.C. 4731.22(F)(1)[6]. Mr. Renz also argued that Dr. Tenpenny, as a party at a hearing, was entitled pursuant to R.C. 119.13 to have an attorney represent her and to have that attorney cross-examine witnesses[7] and that the Board was attempting to mislead her on her rights by citing to R.C. 9.84 in its letter accompanying the subpoena[8]. (St. Ex. 5 at 1-2) Mr. Renz also alleged bad faith on the part of the Board:

> Bad faith is evident by your failure to present evidence that our client violated a provision of Chapter 4731, your erroneous and misleading citation to R.C. § 9.84 regarding her right to counsel, your failure to communicate directly with our law firm regarding this subpoena, and your complete lack of any grounds whatsoever for continuing to harass Dr. Tenpenny.

(St. Ex. 5 at 2)

In addition, Mr. Renz wrote:

> For the foregoing reasons, the October 12, 2021, subpoena is demonstrably unlawful and unenforceable and, therefore, Dr. Tenpenny will not participate in the Board's ongoing illegal fishing expedition. Declining to cooperate in the Board's bad faith and unjustified assault on her licensure, livelihood, and constitutional rights cannot be construed as an admission of any allegations against her.

(St. Ex. 5 at 3)

---

[5] Similar to the previous letter, the October 31, 2021 letter was cosigned by Jeffrey Steltzer, but the hearing examiner was unable to locate Mr. Steltzer in the Supreme Court of Ohio's attorney directory. < https://www.supremecourt.ohio.gov/attorneysearch/#/search> search term "Steltzer", accessed July 8, 2023

[6] R.C. 4731.22(F)(1) addresses written reports being made to the Board by individuals that claim a violation of R.C. 4731. It does not provide for the delivery of such a report to the target of the investigations. Further R.C. 4731.22(F)(5) specifically states that such reports and complaints are confidential and not subject to discovery.

[7] This letter was sent to the Board in October 2021, but the Notice sent to Dr. Tenpenny pursuant to R.C. 119 was not issued until September 2022.

[8] R.C. 9.84 addresses the rights of a witness to counsel when appearing before a public agency, or any representative thereof, in any administrative or executive proceeding **or investigation**. (emphasis added)

Mr. Renz also wrote that further attempts to enforce the subpoena or obtain responses to the Interrogatories would result in a filing requesting declaratory and injunctive relief as well as any other available remedies. (St. Ex. 5 at 3)

18. On November 3, 2021, James Roach, an attorney for the Board, attempted to conduct the deposition of Dr. Tenpenny. After waiting approximately half an hour after the scheduled time, Mr. Roach went on the record and stated that Dr. Tenpenny had not appeared and that Ms. Pastrick had not received any communication from Mr. Renz or Dr. Tenpenny.[9] Mr. Roach also stated that Dr. Tenpenny's email address of record was stenpenny@tenpennyimc.com. (St. Ex. 6)

19. At hearing, when asked if the Board had ever sought a court order to compel production of records or persons pursuant to a subpoena, Ms. Pastrick answered, "Not in my personal capacity as an enforcement attorney." (Tr. at 42-43)

20. Ms. Pastrick testified that she did not respond to the objections raised by Mr. Renz in his letter. (Tr. at 44)

Investigative Office Conference

21. By letter dated June 9, 2022, the Board directed Dr. Tenpenny to appear at the Board's offices on "<DATE> at <TIME>" for an investigative office conference. (Respondent Exhibit C) On June 21, 2022, the Board sent a new letter regarding the investigative office conference, which specified it was to occur on July 26, 2022 at 1:15 p.m. at the Board's offices. (St. Ex. 7) Both letters stated that the purpose of the conference was "to discuss Dr. Tenpenny's medical care of patients" and included the following warning:

> Please be advised that you are required by law to cooperate in an investigation conducted by the Board. Failure to appear for the office conference as scheduled may result in the issuance of a subpoena to compel your appearance at a deposition. Further, failure to cooperate in the Board's investigation, including failure to appear and/or failure to answer questions truthfully at the office conference, constitutes legal grounds for discipline that may potentially result in the denial, suspension, or revocation of your license to practice, as well as a civil penalty up to $20,000.00.

(Resp. Ex. C; St. Ex. 7 at 1)

22. The June 21, 2022 letter was sent to Dr. Tenpenny by certified mail and a copy was also sent to Mr. Renz. (St. Ex. 7 at 1) The letter includes one certified mail number: 9489 0090 0027 6431 0685 85. (St. Ex. 7 at 1) Tracking information for this certified mail number

[9] While Mr. Renz's letter is dated October 31, 2021, it was stamped as received by the Board on November 3, 2021. While we do not know what time that day the letter was received in the Board's office, it is reasonable to assume that the letter had not reached either Mr. Roach or Ms. Pastrick by the time Mr. Road attempted to conduct the deposition.

shows that it was delivered to Fremont, Ohio, on June 27, 2022. (St. Ex. 7 at 2-3) Mr. Renz's office is in Fremont, Ohio. (St. Exs. 3 and 5)

23. If her affidavit, Dr. Tenpenny swore that she did not receive the June 9, 2022 letter but was made aware of it by her attorney. (Resp. Wr. Resp. – Ex. B at 2) She further swore that she was not aware of the June 21, 2022 letter from the Board until after she had requested a hearing. (Resp. Wr. Resp. – Ex. B at 3)

24. At hearing, Ms. Pastrick explained what happened with the June 9 and June 21, 2022 letters: "At the time our administrative assistant retired and we had one who was not familiar with these letters draft it for us and that was simply a typo and a corrected letter, the June 21st was sent out as soon as we were aware of it." (Tr. at 23) She later testified that she discovered the error during a review of internal documents. (Tr. at 46) Ms. Pastrick further testified that she did not reach out to either Mr. Renz or Dr. Tenpenny to inform them that another letter would be coming. (Tr. at 47)

25. When asked the difference between a subpoena and an investigative office conference, Ms. Pastrick answered, "The subpoena can be compelled for compliance. An investigative office conference is a bit more casual as a request." (Tr. at 45)

26. By letter dated July 5, 2022, Mr. Renz informed Bruce Saferin, D.P.M., then Supervising Member of the Board, that the June 9, 2022 letter to Dr. Tenpenny regarding an investigative office conference failed to include both a date and time. Mr. Renz further wrote:

> In addition, we decline because your letter is completely bereft of any cause for this hearing and Dr. Tenpenny has not been fully apprised of the violations, if any, being considered by the board. Absent an official fact-specific written statement from the Board of the allegations and accompanying written interrogatories, our client will not be answering any questions in what appears to be another of the Board's bad-faith fishing expeditions designed to harass, intimidate, and entrap another good doctor. Declining to cooperate in the Board's bad faith and unjustified assault on her licensure, livelihood, and constitutional rights cannot be construed as an admission of any allegations against her and is no grounds for disciplinary action.

(St. Ex. 8)

There is no indication in his July 5, 2022 letter that Mr. Renz received the Board's June 21, 2022 letter which corrected the oversight by providing the date and time of the investigative office conference. (St. Ex. 8)

27. Ms. Pastrick testified that she received Mr. Renz's July 5, 2022 letter. When asked if she reached out to Mr. Renz to inform him the June 9, 2022 letter was in error, Ms. Pastrick

responded, "A corrected version was sent soon after. So it was assumed that that would be the notification." She further testified that she did not have any concerns that Mr. Renz's July 5, 2022 letter addressed the incorrect June 9, 2022 Board letter "because our tracking showed that the corrected letter had been delivered." (Tr. at 50)

28. Ms. Pastrick testified that she was not surprised she did not receive a response from Mr. Renz regarding the corrected letter dated June 21, 2022 as she "believe[d] that his letter of July 5th was informing the Board that they decline to participate and the third paragraph pretty much states his reasons." (Tr. at 52)

29. Ms. Patrick testified that Dr. Tenpenny did not attend the investigative office conference. (Tr. at 23)

Additional Information

30. Dr. Tenpenny swore in her affidavit, "It was my belief and understanding that the Board had accepted the objections I had filed to its requests as meritorious, otherwise the Board would have responded or sought an Order from a court to require me to comply." (Resp. Wr. Resp. – Ex. B at 3)

31. Ms. Pastrick testified that, as of the hearing, the Board has not received any information from Dr. Tenpenny in response to its investigation. (Tr. at 27)

FINDINGS OF FACT

1. On July 14, 2021, a Board investigator attempted to interview Dr. Tenpenny at her office, but she was not present. The investigator left a business card for her with the receptionist. On July 21, 2021, the investigator sent an email to Dr. Tenpenny at an email address she had previously provided the Board and requested she contact him to schedule a time to speak with him. Dr. Tenpenny did not respond to the investigator, and there is no evidence that the email was not delivered.

2. On September 7, 2021, the Board sent the Interrogatories to Dr. Tenpenny by certified mail at her credential mailing address. Dr. Tenpenny's responses were due no later than October 8, 2021. The Interrogatories were delivered to Dr. Tenpenny's address on September 9, 2021. By letter dated September 20, 2021, Dr. Tenpenny notified the Board through her legal counsel that she did not believe the Board had a lawful basis for sending the Interrogatories and that she would not submit responses to the Interrogatories. No response to the Interrogatories was ever received by the Board.

3. As part of an investigation, on October 12, 2021, the Board sent to Dr. Tenpenny by certified mail at her credential mail address an Investigative Subpoena for Deposition. As set forth in the subpoena, Dr. Tenpenny was ordered to appear in the offices of the Board in

Columbus, Ohio, on November 3, 2021 at 1:00 p.m. for an investigatory deposition. Dr. Tenpenny was duly notified of the subpoena and the date of the deposition as the subpoena was delivered to her address on October 15, 2021. A copy was also sent by certified mail to her legal counsel. By letter dated October 31, 2021, but not stamped as received by the Board until November 3, 2021, Dr. Tenpenny notified the Board through her legal counsel that she did not believe the Board had a lawful basis for the deposition and that she would not participate. Dr. Tenpenny failed to appear at the Board's offices on November 3, 2021 for the deposition.

4. As part of an investigation, on June 9, 2022, the Board mailed to Dr. Tenpenny at her credential mailing address, a letter directing her to attend an investigative office conference at the Board's office. However, this letter did not include the date and time of the office conference. On or about June 21, 2022, the Board mailed a corrected letter to Dr. Tenpenny at her credential mailing address which stated the investigative office conference was to be held on July 26, 2022 at 1:15 p.m. There is no evidence in the record that the June 21, 2022 letter was delivered to Dr. Tenpenny, but a copy of the June 21, 2022 letter was also mailed to Dr. Tenpenny's legal counsel by certified mail and was delivered on June 27, 2022. There is no evidence in the record that the June 21, 2022 letter was delivered to Dr. Tenpenny. By letter dated July 5, 2022, Dr. Tenpenny notified the Board through her legal counsel that she did not believe the Board had a lawful basis for the investigative office conference and would not participate. Dr. Tenpenny failed to appear at the Board's offices on July 26, 2022 for the investigative office conference.

CONCLUSIONS OF LAW

Dr. Tenpenny's acts, conduct, and/or omissions as set forth in Findings of Fact 1 through 4 above, individually and/or collectively, constitute "[f]ailure to cooperate in an investigation conducted by the board under division (F) of this section, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board in an investigative interview, an investigative office conference, at a deposition, or in written interrogatories," as that clause is used in R.C. 4731.22(B)(34).

Pursuant to R.C. 4731.225, the Board is authorized to impose a civil penalty for this violation. The Board's fining guideline for this violation is as follows:

Minimum Fine: $3,000
Maximum Fine: $5,000

LEGAL DISCUSSION

It is undisputed that Dr. Tenpenny did not answer the Interrogatories, did not appear for the deposition, and did not attend the office conference. Dr. Tenpenny's refusal was based on her subjective belief that the Board had no legal basis for its investigation and that it had exceeded its investigative authority. In her written defense, Dr. Tenpenny argued that the Board failed to show any evidence that she may have violated anything in R.C. 4731.22(B), or any other statute or rule, and further argued that "it appears the Board has intentionally concealed the underlying basis of the investigation of Dr. Tenpenny including entirely omitting the basis for initiating the investigation in the [Notice]." (Resp. Wr. Resp.at 5) She further wrote, "A Board investigation initiated without any evidence that appears to show a violation of R.C. 4731.22 or other rule is unlawful, exceeds the Board's investigatory authority and is in bad faith." (Resp. Wr. Resp. at 5)

R.C. 4731.22(F)(1) states, in part, "The board **shall** investigate evidence that appears to show that a person has violated any provision of this chapter or any rule adopted under it." (emphasis added) There was uncontradicted testimony from Ms. Pastrick that the Board had received approximately 350 complaints regarding Dr. Tenpenny and that some of those complaints contained allegations that, if true, would constitute a violation of R.C. 4731.22(B). (Tr. at 16, 53-56) Pursuant to R.C. 4731.22(F)(1), the Board was statutorily required to investigate the complaints against Dr. Tenpenny that appeared to show a violation of R.C. 4731.22(B).

Dr. Tenpenny contended that the Board's investigation was "based solely upon public statements she made that the Board deemed to be dissemination of *misinformation* or *disinformation* or unapproved information about the COVID-19 vaccines; and/or political speech disapproved by the Board." (Resp. Wr. Resp. at 5) (emphasis in original) She went on to say there is no statute or rule granting the Board authority to regulate or investigate a physician's public speech "which has no bearing on their ability to practice medicine," and therefore no lawful grounds for investigation. In support of her argument she cites *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC, 2023 U.S. Dist. LEXIS 13131, at *1 (E.D. Cal. Jan. 25, 2023) and stated that a federal district court found a specific California law regarding dissemination of COVID-19 misinformation by physicians to be unconstitutional and granted a preliminary injunction. However, a decision granting a preliminary injunction against a California statute from a federal district court in another jurisdiction is not binding on a matter in Ohio, particularly when there is no similar Ohio statute.

As to Dr. Tenpenny's claims that the Board was attempting to investigate statements which were public and/or political speech and therefore protected by the First Amendment to the U.S. Constitution, Dr. Tenpenny has not provided sufficient evidence of what those statements were in order to enable a determination to be made of whether such statements were protected speech. Further, there is insufficient evidence to show that the Board's investigation was initiated due to any protected speech.

Later in her written response, Dr. Tenpenny stated that "every substantive question [in the Interrogatories] was posed to elicit a response for the Board to determine Dr. Tenpenny's views on the extent to which she believed the COVID-19 vaccines to be safe and effective, and whether

or not she told her patients the COVID-19 vaccines were safe and effective." (Resp. Wr. Resp. at 7) The Board also asked in the Interrogatories for Dr. Tenpenny to answer questions regarding other vaccines and whether her patients had contracted diseases for which vaccines existed and that she recommended against receiving. In addition, the Board asked Dr. Tenpenny to provide her sources regarding certain COVID-19 vaccine claims. (St. Ex. 2) A reasonable conclusion from these questions is that the Board may have been investigating whether Dr. Tenpenny's practice was conforming to minimal standards of care. Failing to practice according to minimal standards of care may constitute a violation of R.C. 4731.22(B)(6) and is a basis for a Board investigation. The fact that the Board asked Dr. Tenpenny for her sources of certain claims indicates its willingness to consider such information.

Dr. Tenpenny's argument that the Board did not include information in the Notice regarding the *possible* violations it was attempting to investigate is not well taken. R.C. 119.07 provides the following in regard to the allegations to be included in a notice of opportunity for hearing: "Notice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time of mailing the notice." R.C 119.07 is an integral part of providing due process in administrative law:

> A fundamental requirement of due process, that is, notice and an opportunity to be heard, must be afforded an individual whose professional license is subject to [discipline] in an administrative hearing.' " Griffin v. State Med. Bd. of Ohio, 10th Dist. No. 11AP-174, 2011-Ohio-6089, ¶ 22, quoting Johnson v. State Med. Bd. of Ohio, 10th Dist. No. 98AP-1324 (Sept. 28, 1999). R.C. 119.07 provides, in pertinent part, that "notice shall * * * include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing" if the party timely requests a hearing. Further, " 'the right to a hearing includes the right to appear at the hearing prepared to defend oneself through testimony, evidence, or argument against the charges brought.' " Griffin at ¶ 22, quoting Johnson. Thus, " 'due process requires that an individual receive fair notice of the precise nature of the charges that will be raised at a disciplinary hearing.' " Id., quoting Johnson.

(*Wilson v. Ohio State Chiropractic Bd.*,10th Dist. No. 18AP-739 2019-Ohio-3243, paragraph 27)

The Notice in this case included allegations of specific instances of the Board attempting to conduct an investigation and Dr. Tenpenny's response to those attempts as well as an allegation that her conduct was a violation of R.C. 4731.22(B)(34). The Notice also included the required language regarding Dr. Tenpenny's right to a hearing. R.C. 119.07 does not require the Board to include the basis for the underlying investigation in the notice of opportunity for hearing as Dr. Tenpenny was not being charged with any other violations of R.C. 4731.22. In fact, doing so

could be deemed to be prejudicial against licensees. Investigations often do not result in any formal discipline[10]. In such cases, the Board is required to hold all information received during the investigation confidential pursuant to R.C. 4731.22(F)(5). To make public *potential* violations prior to the completion of an investigation may cause reputational damage to the Board's licensees and applicants. Not including such information in the Notice is not evidence of bad faith by the Board but rather the opposite.

In her written defense and in Mr. Renz's September 20, 2021 letter, Dr. Tenpenny made arguments regarding a letter she received from the Board dated August 11, 2021. This letter is not in evidence, and it is not part of the allegations contained in the Notice. Neither the hearing examiner nor the Board can consider documents that are not part of the record. Dr. Tenpenny could have asked to have this document admitted but did not do so. The only information before the Board about that letter is in Dr. Tenpenny's written defense and in the arguments of Mr. Renz in State's Exhibit 3. From Mr. Renz's letter, it appears that the August 11, 2021 letter was [redacted] (St. Ex. 3 at 1) [redacted]

Dr. Tenpenny incorporated in her written defense the objections listed in Mr. Renz's September 20, 2021 letter and claimed that Mr. Renz gave five objections to the Interrogatories, but the first, second, and fourth objections in his letter are directed solely at the August 11, 2021 Board letter which, as previously stated, is not the subject of an allegation in the Notice nor a document contained in the hearing record. The third objection in the September 20, 2021 letter primarily addresses the August 11, 2021 letter and only mentioned the Interrogatories to say they do not request information regarding [redacted] "underscores the appearance of bad faith" in the Board's August 11, 2021 letter. (St. Ex. 3 at 2) As discussed above, the Board was statutorily required to investigate complaints about Dr. Tenpenny that appeared to show a violation of R.C. 4731 or any rules adopted under it. Again, the hearing examiner and the Board cannot reach an appropriate decision on objections regarding this August 11, 2021 letter as it is not part of the record.

The fifth objection in the September 20, 2021 letter is that the Interrogatories [redacted] (St. Ex. 3 at 3) While there is no evidence other than Mr. Renz's letter regarding the Board's belief [redacted] And in order for the Board to impose discipline, it would

[10] The Board's Fiscal Year 2022 Annual Report shows that 51% of complaints were closed that year after investigation with no formal disciplinary action initiated. (https://med.ohio.gov/static/portals/0/publications/annual%20reports/smbo%20fy22%20annual%20report.pdf at 14, accessed July 11, 2023)

need to be able to investigate a physician. Notably, Dr. Tenpenny did not request any sort of accommodation in order to respond to the Interrogatories. Instead, Mr. Renz wrote, "The September 7th Interrogatories are invasive, irrelevant to any inquiry into Dr. Tenpenny's [redacted] and advised the Board that Dr. Tenpenny would not respond to them. (St. Ex. 3 at 3)

Incongruously, Dr. Tenpenny claimed in her written response that Mr. Renz's September 20, 2021 letter "was not a refusal to cooperate, rather it put the Board on notice of her legal objections to the Board's actions and that she intended to fully and lawfully defend her rights." (Resp. Wr. Resp. at 9) Instructions for the Interrogatories included the following: "To the extent that you believe any of the interrogatories are objectionable, answer so much of the interrogatory and each subpart thereof that is not objectionable, and separately state the objection and each ground for each such objection as to each subpart." (St. Ex. 2 at 5-6) Dr. Tenpenny failed to answer the Interrogatories in their entirety. Her objections were not to any particular question in the Interrogatories, but rather to the Board's investigation itself. She failed to answer seemingly minor questions in the Interrogatories including even those regarding her practice name and location and her board certifications. (St. Ex. 2 at 7-9)

R.C. 4731.22(B)(34) provides that the Board may take disciplinary action for the following reasons:

> Failure to cooperate in an investigation conducted by the board under division (F) of this section, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board in an investigative interview, an investigative office conference, at a deposition, or in written interrogatories, except that failure to cooperate with an investigation shall not constitute grounds for discipline under this section if a court of competent jurisdiction has issued an order that either quashes a subpoena or permits the individual to withhold the testimony or evidence in issue[.]

As discussed above, the Board was conducting an investigation into Dr. Tenpenny pursuant to R.C. 4731.22(F)(1). The Board attempted to question Dr. Tenpenny by written interrogatories, a deposition, and an investigative office conference. R.C. 4731.22(B)(34) specifies that the failure to comply with a Board subpoena or order or failure to answer truthfully in any of these three methods constitutes failure to cooperate in an investigation. While R.C 4731.22(B)(34) goes on to say that to say it is not grounds for discipline if there is a court order either quashing a subpoena or permitting the withholding of testimony or evidence at issue, neither of those situations occurred here. There is no evidence in the record that either the Board or Dr. Tenpenny sought a court order in this matter. R.C. 4731.22(B)(34) does not impose the requirement that the Board seek a court order as a precondition to initiating disciplinary action. Dr. Tenpenny could have filed a motion in court to quash the Board's subpoena for deposition or requested to be able to withhold her answers to the Interrogatories, but she did not do so.

Dr. Tenpenny also made an argument that she reasonably believed her objections were accepted by the Board. This argument might have been reasonable if the Board had ceased its

investigation after Mr. Renz's September 20, 2021 letter, but it did not. The Board continued its investigation and made both Dr. Tenpenny and her counsel aware that it was continuing its investigation. It sent her a subpoena to appear for a deposition, it asked her to appear for an investigatory office conference (albeit requiring a corrected letter after the initial letter omitted the date and time of the conference), and it then issued the Notice in September 2022. It appears to the hearing examiner that the Board was attempting to find an avenue in which Dr. Tenpenny would engage with the Board investigation in any way other than outright refusal. Further, there was nothing preventing Dr. Tenpenny from cooperating with the investigation after the Notice was issued.

Dr. Tenpenny argued that R.C. 4731.22(B)(34) is unconstitutional on its face and as applied to the current case. Administrative agencies lack the jurisdiction to determine the constitutional validity of a statute so the hearing examiner will not address those arguments. (Cleveland Gear Co. v. Limbach, 35 Ohio St. 3d 229, 231, 520 N.E.2d 188, 191 (1988))

In short, Dr. Tenpenny did not simply fail to cooperate with a Board investigation, she refused to cooperate. And that refusal was based on her unsupported and subjective belief regarding the Board's motive for the investigation. Licensees of the Board cannot simply refuse to cooperate in investigations because they decide they do not like what they assume is the reason for the investigation.

PROPOSED ORDER

It is hereby ORDERED that:

A. **SUSPENSION OF LICENSE**: The license of Sherri J. Tenpenny, D.O., to practice osteopathic medicine and surgery in the State of Ohio shall be SUSPENDED for an indefinite period of time.

B. **FINE**: Within thirty days of the effective date of this Order, Dr. Tenpenny shall remit payment in full of a fine of three thousand dollars ($3,000). Such payment shall be made via credit card in the manner specified by the Board through its online portal, or by other manner as specified by the Board.

C. **CONDITIONS FOR REINSTATEMENT OR RESTORATION**: The Board shall not consider reinstatement or restoration of Dr. Tenpenny's license to practice osteopathic medicine and surgery until all of the following conditions have been met:

1. **Application for Reinstatement or Restoration**: Dr. Tenpenny shall submit an application for reinstatement or restoration, accompanied by appropriate fees, if any.

2. **Payment of Fine**: Dr. Tenpenny shall have fully paid the fine as set forth in Paragraph B of this Order.

3. **Certification of Cooperation with Board Investigation**: Dr. Tenpenny shall submit a written statement from the Board's Enforcement Division that Dr. Tenpenny has fully complied with all subpoenas and interrogatories issued to her by the Board.

4. **Additional Evidence of Fitness To Resume Practice**: In the event that Dr. Tenpenny has not been engaged in the active practice of osteopathic medicine and surgery for a period in excess of two years prior to application for reinstatement or restoration, the Board may exercise its discretion under Section 4731.222, Ohio Revised Code, to require additional evidence of her fitness to resume practice.

D. **VIOLATION OF THE TERMS OF THIS ORDER**: If Dr. Tenpenny violates the terms of this Order in any respect, the Board, after giving her notice and the opportunity to be heard, may institute whatever disciplinary action it deems appropriate, up to and including the permanent revocation of her license.

E. **REQUIRED REPORTING TO THIRD PARTIES; VERIFICATION**:

1. **Required Reporting to Employers and Others**: Within 30 days of the effective date of this Order, Dr. Tenpenny shall provide a copy of this Order to all employers or entities with which she is under contract to provide healthcare services (including but not limited to third-party payors), or is receiving training, and the Chief of Staff at each hospital or healthcare center where she has privileges or appointments. Further, Dr. Tenpenny shall promptly provide a copy of this Order to all employers or entities with which she contracts in the future to provide healthcare services (including but not limited to third-party payors), or applies for or receives training, and the Chief of Staff at each hospital or healthcare center where she applies for or obtains privileges or appointments.

   In the event that Dr. Tenpenny provides any healthcare services or healthcare direction or medical oversight to any emergency medical services organization or emergency medical services provider in Ohio, within 30 days of the effective date of this Order, she shall provide a copy of this Order to the Ohio Department of Public Safety, Division of Emergency Medical Services.

   Further, within 30 days of the date of each such notification, Dr. Tenpenny shall provide documentation acceptable to the Secretary and Supervising Member of the Board demonstrating that the required notification has occurred.

2. **Required Reporting to Other Licensing Authorities**: Within 30 days of the effective date of this Order, Dr. Tenpenny shall provide a copy of this Order by certified mail to the proper licensing authority of any state or jurisdiction in which she currently holds any professional license, as well as any federal agency or entity, including but not limited to the Drug Enforcement Administration, through which she

currently holds any professional license or certificate. Also, Dr. Tenpenny shall provide a copy of this Order by certified mail at the time of application to the proper licensing authority of any state or jurisdiction in which she applies for any professional license or reinstatement/restoration of any professional license.

Additionally, within 30 days of the effective date of this Order, Dr. Tenpenny shall provide a copy of this Order to any specialty or subspecialty board of the American Board of Medical Specialties or the American Osteopathic Association Bureau of Osteopathic Specialists under which she currently holds or has previously held certification.

Further, within 30 days of the date of each such notification, Dr. Tenpenny shall provide documentation acceptable to the Secretary and Supervising Member of the Board demonstrating that the required notification has occurred.

This Order shall become effective immediately upon the mailing of the notification of approval by the Board.

Kimberly A. Lee
Hearing Examiner

State Medical Board of Ohio

30 E. Broad St., 3rd Floor
Columbus, Ohio 43215
(614) 466-3934
www.med.ohio.gov

EXCERPT FROM THE DRAFT MINUTES OF AUGUST 9, 2023 IN THE MATTER OF SHERRI J. TENPENNY, D.O.

.....

REPORTS AND RECOMMENDATIONS

Dr. Johnson asked the Board to consider the Report and Recommendation appearing on the agenda: Roland F. Chalifoux, Jr., D.O.; Yagnaram Ravichandran, M.D.; Sherri J. Tenpenny, D.O.; and James Zedaker, P.A.

Dr. Johnson asked all Board members the following questions:

1.) Has each member of the Board received, read and considered the Hearing Record; the Findings of Fact, Conclusions and Proposed Orders; and any objections filed in each of the Reports and Recommendations?

2.) Does each member of the Board understand that the Board's disciplinary guidelines do not limit any sanction to be imposed, and that the range of sanctions available in each matter runs from Dismissal to Permanent Revocation or Permanent Denial?

3.) Does each member of the Board understand that in each matter eligible for a fine, the Board's fining guidelines allow for imposition of the range of civil penalties, from no fine to the statutory maximum amount of $20,000?

ROLL CALL:

Dr. Rothermel	- aye
Dr. Kakarala	- aye
Dr. Reddy	- aye
Dr. Soin	- aye
Dr. Boyle	- aye
Dr. Feibel	- aye
Dr. Lewis	- aye
Ms. Montgomery	- aye
Ms. Brumby	- aye
Dr. Bechtel	- aye
Dr. Johnson	- aye

In accordance with the provision in Ohio Revised Code 4731.22(F)(2), specifying that no member of the Board who supervises the investigation of a case shall participate in further adjudication of the case, the Secretary and Supervising Member must abstain from further participation in the adjudication of any disciplinary matters. In the disciplinary matters before the Board today, Dr. Rothermel served as Secretary and Mr. Giacalone served as Supervising Member. In addition, Dr. Bechtel served as Secretary and/or Supervising Member in the matters of Dr. Chalifoux and Dr. Tenpenny.

During these proceedings, no oral motions may be made by either party.

.....

Sherri J. Tenpenny, D.O.

.....

Dr. Feibel moved to approve and confirm the Proposed Findings of Fact, Conclusions of Law, and Proposed Order in the matter of Dr. Tenpenny. Dr. Lewis seconded the motion.

.....

A vote was taken on Dr. Feibel's motion to approve and confirm:

ROLL CALL:	Dr. Rothermel	- abstain
	Dr. Kakarala	- abstain
	Dr. Reddy	- aye
	Dr. Soin	- aye
	Dr. Boyle	- aye
	Dr. Feibel	- aye
	Dr. Kakarala	- aye
	Ms. Montgomery	- aye
	Dr. Boyle	- aye
	Dr. Bechtel	- abstain
	Dr. Johnson	- aye

The motion to approve carried.

State Medical Board of Ohio

30 E. Broad St., 3rd Floor
Columbus, Ohio 43215
(614) 466-3934
www.med.ohio.gov

September 14, 2022

Case number: 22-CRF- 0168

Sherri J. Tenpenny, D.O.
7380 Engle Road
Middleburg Heights, Ohio 44130

Dear Dr. Tenpenny:

In accordance with Chapter 119., Ohio Revised Code, you are hereby notified that the State Medical Board of Ohio [Board] intends to determine whether or not to limit, revoke, permanently revoke or suspend your license or certificate, or refuse to grant or register or issue the license or certificate for which you have a pending application in accordance with Section 9.79 of the Ohio Revised Code, or refuse to renew or reinstate your license or certificate to practice osteopathic medicine and surgery, or to reprimand you or place you on probation for one or more of the following reasons:

(1) On or about July 14, 2021, a Board investigator attempted to interview you at your office, which was also your credential mailing address. After the receptionist confirmed that you were not present, the Board investigator left his business card with her with a request that his business card be given to you with the message that he needed to speak with you. You failed to respond to his request. Consequently, on or about July 21, 2021, the Board investigator sent an email to you requesting you contact him at the earliest convenience to schedule an interview. The investigator received no indication that the email was not delivered. You failed to respond to this email.

(2) As part of an investigation, on or about September 7, 2021, the Board sent to you via certified mail, at your credential mailing address, the State Medical Board of Ohio's First Set of Interrogatories Directed to Sherri J. Tenpenny, D.O. [Interrogatories]. As was set forth in the Interrogatories and accompanying cover letter, your responses were due no later than October 8, 2021. You were duly notified of the Interrogatories and the due date for your responses, as the certified letter was delivered on September 9, 2021. By letter dated September 20, 2021, you notified the Board through your legal counsel that you did not believe that the Board had a lawful basis for sending the Interrogatories and that you will not submit responses to the Interrogatories. No response to the Interrogatories was received by the Board.

(3) As part of an investigation, on or about October 12, 2021, the Board sent to you via certified mail, to your credential mailing address, an Investigative Subpoena for Deposition [subpoena]. As was set forth in the subpoena, you were ordered to appear in the offices of the Board, in Columbus, Ohio, on November 3, 2021, at 1:00 p.m. for an investigatory deposition. You were duly notified of the subpoena and the date of the deposition, as the certified letter containing the subpoena was delivered on October 15, 2021. By letter dated October 31, 2021, you notified the Board through your legal counsel that you did not

Mailed 9-15-2022

believe that the Board had a lawful basis for the deposition and that you would not participate. You failed to appear at the Board Office on November 3, 2021.

(4) As part of an investigation, on or about June 21, 2022, the Board sent to you via certified mail, at your credential mailing address, a letter directing you to attend an investigative office conference on July 26, 2022, at 1:15 p.m., at the offices of the Board. You were duly notified of the investigative office conference, as the certified letter was delivered on June 27, 2022. By letter dated July 5, 2022, you notified the Board through your legal counsel that you did not believe that the Board had a lawful basis for the investigative office conference and that you would not participate. You failed to appear at the Board Office on July 26, 2022.

Your acts, conduct, and/or omissions as alleged in paragraph (1) through (4) above, individually and/or collectively, constitute "[f]ailure to cooperate in an investigation conducted by the board under division (F) of this section, including failure to comply with a subpoena or order issued by the board or failure to answer truthfully a question presented by the board in an investigative interview, an investigative office conference, at a deposition, or in written interrogatories," as that clause is used in Section 4731.22(B)(34), Ohio Revised Code.

Furthermore, for any violations that occurred on or after September 29, 2015, the Board may impose a civil penalty in an amount that shall not exceed twenty thousand dollars, pursuant to Section 4731.225, Ohio Revised Code. The civil penalty may be in addition to any other action the Board may take under section 4731.22, Ohio Revised Code.

Pursuant to Chapter 119., Ohio Revised Code, you are hereby advised that you are entitled to a hearing in this matter. If you wish to request such hearing, the request must be made in writing and must be received in the offices of the State Medical Board within thirty days of the time of mailing of this notice.

You are further advised that, if you timely request a hearing, you are entitled to appear at such hearing in person, or by your attorney, or by such other representative as is permitted to practice before this agency, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for or against you.

In the event that there is no request for such hearing received within thirty days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, permanently revoke, suspend, refuse to grant or register or issue the license/certificate for which you have a pending application in accordance with Section 9.79 of the Ohio Revised Code, or refuse to renew or reinstate your license or certificate to practice osteopathic medicine and surgery, or to reprimand you or place you on probation.

Please note that, whether or not you request a hearing, Section 4731.22(L), Ohio Revised Code, provides that "[w]hen the board refuses to grant or issue a license or certificate to practice to an applicant, revokes an individual's license or certificate to practice, refuses to renew an individual's license or certificate to practice, or refuses to reinstate an individual's license or certificate to practice, the board may specify that its action is permanent. An individual subject to a permanent action taken by the board is forever thereafter ineligible to hold a license

or certificate to practice and the board shall not accept an application for reinstatement of the license or certificate or for issuance of a new license or certificate."

Copies of the applicable sections are enclosed for your information.

Very truly yours,

Kim G. Rothermel, M.D.
Secretary

KGR/MAP/lv
Enclosures

CERTIFIED MAIL # 9414 8149 0315 2968 0092 29
RETURN RECEIPT REQUESTED

cc: Thomas Renz
Renz Law
1907 W State St # 162
Fremont Ohio 43420

CERTIFIED MAIL # 9414 8149 0315 2968 0092 36
RETURN RECEIPT REQUESTED